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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 432

A. ROBERT RAY,

Petitioner,

—v.—

CITY OF PRICHARD, ALABAMA.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

FRANKIE FIELDS
VERNON Z. CRAWFORD
1407 Davis Avenue
Mobile, Alabama 36603

JACK GREENBERG
JAMES M. NABRIT, III
MELVYN ZARR
10 Columbus Circle
New York, New York 10019

Attorneys for Petitioner

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A. ROBERT RAY,

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CITY OF PRICHARD, ALABAMA.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

Petitioner A. Robert Ray prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Alabama in the above entitled case.

Opinions Below

The opinion of the Court of Appeals of Alabama, First Division, is reported at 222 So. 2d 345, and the opinion and judgment of that court are set forth in Appendix I, pp. 1a-3a, *infra*. The order of the Supreme Court of Alabama denying certiorari is reported at 222 So. 2d 346, and is set forth in Appendix I, p. 4a, *infra*.

Jurisdiction

The judgment of the Court of Appeals of Alabama, First Division, was entered March 4, 1969 (R. 147). Petitioner's timely petition for rehearing was denied April 1, 1969 (R. 153). Petitioner's timely petition for writ of certiorari was

filed in the Supreme Court of Alabama on April 14, 1969 (R. 154), and denied May 8, 1969 (R. 158).

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3), petitioner having asserted below and asserting here deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Questions Presented

1. Is petitioner's conviction for parading without a permit unconstitutional under this Court's decisions in *Shuttlesworth* v. *City of Birmingham,* 394 U. S. 147 (1969), and cases cited?

2. The Court of Appeals of Alabama dismissed petitioner's appeal because petitioner's counsel had set forth petitioner's assignments of error in her brief rather than on the page reserved for that purpose in the record. Is this a procedural default sufficient to bar review by this Court of petitioner's substantial federal claims?

Constitutional and Statutory Provisions Involved

This case involves the First Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

This case also involves the following ordinance of the City of Prichard, a municipal corporation of the State of Alabama:

ORDINANCE NO. 1135

AN ORDINANCE.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF PRICHARD, ALABAMA, AS FOLLOWS:

Section 1. Short Title. This Ordinance shall be known and may be cited as the "Parade Ordinance of the City of Prichard."

Section 2. Definitions.

(1) "City Clerk" is the City Clerk of the City of Prichard.

(2) "City" is the City of Prichard.

(3) "Parade" is any parade, march, ceremony, show, exhibition, pageant, or procession of any kind, or any similar display, in or upon any street, park or other public place in the City.

(4) "Parade Permit" is a permit as required by this Ordinance.

(5) "Person" is any person, firm, partnership, association, corporation, company or organization of any kind.

(6) "City Council" is the City Council of the City of Prichard.

Section 3. Permit Required. No person shall engage in, participate in, aid, form or start any parade, unless a parade permit shall have been obtained from the City Council.

(1) Exceptions. This Ordinance shall not apply to:

(a) funeral processions;

(b) students going to and from school classes or participating in educational activities, providing such conduct is under the immediate direction and supervision of the proper school authorities;

(c) a governmental agency acting within the scope of its functions.

Section 4. Application. A person seeking issuance of a parade permit shall file an application with the City Clerk on forms provided by the City Clerk.

(1) Filing Period. An application for a parade permit shall be filed with the City Clerk not less than seven (7) days nor more than thirty (30) days before the date on which it is proposed to conduct the parade.

(2) Contents. The application for a parade permit shall set forth the following information:

(a) The name, address and telephone number of the person seeking to conduct such parade;

(b) If the parade is proposed to be conducted for, on behalf of, or by an organization, the name, address and telephone number of the headquarters of the organization, and of the authorized and responsible heads of such organization;

(c) The name, address and telephone number of the person who will be the parade chairman and who will be responsible for its conduct;

(d) The date when the parade is to be conducted;

(e) The route to be traveled, the starting point and the termination point;

(f) The approximate number of persons who, and animals and vehicles which, will constitute such parade; the type of animals, and description of the vehicles;

(g) The hours when such parade will start and terminate;

(h) A statement as to whether the parade will occupy all or only a portion of the width of the streets proposed to be traversed;

(i) The location by streets of any assembly areas for such parade;

(j) The time at which units of the parade will begin to assemble at any such assembly area or areas;

(k) The interval of space to be maintained between units of such parade;

(l) If the parade is designed to be held by, and on behalf of or for, any person other than the applicant, the applicant for such permit shall file with the City Clerk a communication in writing from the person proposing to hold the parade, authorizing the

applicant to apply for the permit on his behalf;

(m) Any additional information which the City Clerk shall find reasonably necessary to a fair determination as to whether a permit should issue.

(3) Late Applications. The City Council, where good cause is shown therefor, shall have the authority to consider any application hereunder which is filed less than seven (7) days before the date such parade is proposed to be conducted.

(4) Fee. There shall be paid at the time of filing the application for a parade permit a fee of $5.00.

Section 5. Standards for Issuance. The City Council shall issue a permit as provided for hereunder when, from a consideration of the application and from such other information as may otherwise be obtained, they find that:

(1) The conduct of the parade will not substantially interrupt the safe and orderly movement of other traffic contiguous to its route;

(2) The conduct of the parade will not require the diversion of so great a number of police officers of the City to properly police the line of movement and the areas contiguous thereto as to prevent normal police protection to the City;

(3) The conduct of such parade will not require the diversion of so great a number of ambulances as to prevent normal ambulance service to portions of the City other than that to be occupied

by the proposed line of march and areas contiguous thereto;

(4) The concentration of persons, animals and vehicles at assembly points of the parade will not unduly interfere with proper fire and police protection of, or ambulance service to, areas contiguous to such assembly areas;

(5) The conduct of such parade will not interfere with the movement of fire-fighting equipment enroute to a fire;

(6) The conduct of the parade is not reasonably likely to cause injury to persons or property, to provoke disorderly conduct or create a disturbance;

(7) The parade is scheduled to move from its point of origin to its point of termination expeditiously and without unreasonable delays enroute;

(8) The parade is not to be held for the sole purpose of advertising any product, goods or event, and is not designed to be held purely for private profit.

Section 6. Notice of Rejection. The City Council shall act upon the application for a parade permit within three (3) days after the filing thereof. If the City Council disapproves the application, the City Clerk shall mail to the applicant within four (4) days after the date upon which the application was filed, a notice of the City Council's action, stating the reasons for denial of the permit.

Section 7. Alternative Permit. The Council, in denying an application for a parade permit, shall be empowered to

authorize the conduct of the parade on a date, at a time, or over a route different from that named by the applicant. An applicant desiring to accept an alternate permit shall, within three (3) days after notice of the action of the City Council, file a written notice of acceptance with the City Council. An alternate parade permit shall conform to the requirements of, and shall have the effect of a parade permit under this Ordinance.

Section 8. Notice to City and Other Officials. Immediately upon the issuance of a parade permit, the City Clerk shall send a copy thereof to the following:

(1) The Chief of Police

(2) The City Attorney

(3) The Fire Chief

(4) The General Manager or responsible head of each public transportation utility, the regular routes of whose vehicles will be affected by the route of the proposed parade.

Section 9. Contents of Permit. Each parade permit shall state the following information:

(1) Starting time;

(2) Minimum speed;

(3) Maximum speed;

(4) Maximum interval of space to be maintained between the units of the parade;

(5) The portions of the streets to be traversed that may be occupied by the parade;

(6) The maximum length of the parade in miles or fractions thereof;

(7) Such other information as the City Council shall find necessary to the enforcement of this Ordinance.

Section 10. Duties of Permittee. A permittee hereunder shall comply with all permit directions and conditions and with all applicable laws and ordinances.

(1) Possession of Permit. The parade chairman or other person heading leading [sic] such activity shall carry the parade permit upon his person during the conduct of the parade.

Section 11. Public Conduct During Parades.

(1) Interference. No person shall unreasonably hamper, obstruct, or impede, or interfere with any parade or parade assembly or with any person, vehicle or animal participating or used in a parade.

(2) Driving Through Parades. No driver of a vehicle, street car or trackless trolley shall drive between the vehicles or persons comprising a parade when such vehicles or persons are in motion and are conspicuously designated as a parade.

(3) Parking on Parade Route. The City Council shall have the authority, when reasonably necessary, to prohibit or restrict the parking of vehicles along a highway or part thereof constituting a part of the route of a parade. The City Council shall cause the Chief of Police

to post signs to such effect, and it shall be unlawful for any person to park or leave unattended any vehicle in violation thereof.

Section 12. Revocation of Permit. The City Council shall have the authority to revoke a parade permit issued hereunder upon failure of the applicants to comply with the standards for issuance and provisions herein set forth.

Section 13. Penalties. Any person, firm or corporation violating any of the provisions of this ordinance shall, upon conviction, be punished by a fine of not more than One Hundred ($100.00) Dollars, and may, in addition, be sentenced to jail or hard labor for the City of Prichard for a period not to exceed six (6) months.

Section 14. Separability. If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions hereof.

Section 15. All ordinances and parts of ordinances in conflict with the provisions of this ordinance are hereby repealed. The repeal provided in this section shall not affect any offense or act committed before the adoption and publication of this ordinance.

Adopted this 20th day of May, 1968.

APPROVED:

/s/ V. O. CAPPS
Mayor

Statement of the Case

Petitioner A. Robert Ray, a Negro minister active in civil rights activities in Mobile County, Alabama, seeks review of his conviction for parading without a permit in violation of City Ordinance No. 1135 of Prichard, Mobile County, Alabama. Rev. Ray is president of the Mobile County Civil Rights Movement, an organization dedicated, among other things, to the attainment of equal employment opportunities for the citizens of Prichard (R. 128, 133).

On May 29, 1968, Rev. Ray, on behalf of the Movement, filed an application for a parade permit with the City Clerk, on a form supplied by her, in apparent conformity with an ordinance passed by the City nine days earlier, Ordinance No. 1135 (R. 32-39), set forth *supra,* pp. 3-10 (R. 64-65). The application sought permission to conduct a parade on June 12th, between 3:30 and 7:30, from Rev. Ray's church and back "to dramatize the urgent need for Equal Opportunity Employment for all citizens" (R. 64-65, 93-94, 133). The filing fee of $5.00 required by Section 4(4) of the ordinance, see p. 6 *supra,* was paid June 6th (R. 65).

The next day, Friday, June 7th, the Mayor and City Council considered Rev. Ray's application and rejected it, assigning ten reasons:

1. The application fails to comply with section 4, subsection (1) of Ordinance No. 1135, regulating the issuance of parade permits, since it was not filed seven days before the date on which the parade was proposed to be held.

2. The application failed to identify the time of day the parade was to commence and end, since it did not designate if the hours shown were A.M. or P.M.
3. The length of time requested for the parade was excessive in either case.
4. In the event it was the intent to have the parade in the afternoon, it would create a traffic hazard due to the congested traffic created by workers returning to their homes after work hours.
5. The disaster which occurred in California this week has created an emotional strain upon society which is not conducive to a parade of this type.
6. The application failed to define the route the parade was to follow from Prichard Park (Zoo) to its point of disbandment.
7. The application failed to clearly define the number of persons to participate in the parade.
8. The application failed to give a definite time that the participants would begin to assemble at the assembly area.
9. Highway 45 and Wilson Avenue are State and Federal Highways and to congest them would be hazardous to life and property.
10. The obstruction along the route designated could seriously hamper the answering of emergency calls including police, fire and ambulance calls.

The Mayor and City Council directed the City Clerk to transmit these reasons by letter to Rev. Ray and Herbert

Belt, executive director of the Movement. That letter, dated June 7th and received by Rev. Ray and Mr. Belt on June 10th, was referred to throughout Rev. Ray's trial (R. 42, 45-46, 49, 107), but, apparently through inadvertence,[1] was not placed into evidence. A certified copy of the letter has been placed on file with the Clerk of this Court and is reprinted as Appendix II, pp. 5a-7a, *infra*. Rev. Ray learned of the denial of the permit through press and radio that day and arranged for a meeting of representatives of the Movement with the Mayor and City Council for the next day (R. 93).

The next evening, Saturday, June 8th, the Mayor, all 5 City Councilmen and the Chief of Police met with Rev. Ray, Mr. Belt and other representatives of the Movement in the Council chamber to discuss conditions for granting the parade permit (R. 60, 76, 84, 130).

The Mayor, 4 of the 5 City Councilmen, the Chief of Police, Rev. Ray, Mr. Belt and 2 other representatives of the Movement—Rev. Ely and Mr. Washington—all testified as to what transpired at that meeting. Their testimony is in agreement on the following points:

(1) That a discussion was carried on for about two hours on proposals by the Chief of Police for changing the time (from 3:30 p.m. to 1:00 p.m.) and the route of the march (R. 67-68, 77, 80-82, 110);

(2) That the representatives of the Movement agreed to these changes (R. 62, 86, 110); and

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[1] The attorney principally responsible for the case attended the funeral of her father the day of trial; her law partner appeared and unsuccessfully sought a continuance (R. 22-26), and proceeded to trial that day only under protest (R. 17-18).

(3) That the Mayor and Councilmen left the chamber for private discussion and, upon returning, announced that they no longer objected to the issuance of the permit (R. 62, 77-79, 81-83, 87, 92, 112).

The record is in sharp conflict, however, as to what the parties understood were the procedural steps to be taken for issuance of the permit. Councilmen Cochran, Everette Turner, Sansom and Alford Turner all testified that the permit could be issued only after an "official" Council meeting on Monday, for which they would require a new or amended application (R. 78, 86, 92, 110-12). Various reasons were given for this disposition. Councilman Alford Turner testified that this was not an "official" meeting because notification of the meeting was by telephone rather than in writing (R. 113). Councilman Cochran testified that it was not an "official" meeting because the City Clerk was not present (R. 79). The Mayor's recollection of that meeting included no request for a new or amended permit application. He testified that the Movement representatives "were to come back Monday to get the permit . . . after the Council took action" (R. 103).

The Movement representatives' testimony supports the Mayor's version. Mr. Belt testified that all the city officials requested was a copy of the grievances to be presented at City Hall and a copy of the new route they had worked out with the Chief of Police. Mr. Belt testified:

> Well, we talked to them about a permit and at first, you know, the pros and cons and whether or not they were going to let us have it and we talked and talked until they agreed, they asked us to let them go outside of the chambers to discuss it among themselves. They

came back and they said OK we agree you can go ahead and have it and I asked them, I said what do you want from us in writing and they said nothing (R. 93).

* * * * *

So I said we're going ahead, we've got 50,000 pamphlets that we're going to put out and the Mayor said go ahead with your publicity. Those were the words he used and I said once we put them out we can't recall them. What else do you want in writing. They said nothing. Then the Mayor spoke up and said you'd better give me a copy of the grievances because if you don't I can only pass the buck (R. 94).

* * * * *

So Rev. Ray said at that point I have a copy of that now and he give it to him. And I said what else do you want in writing and they said that they wanted the route and I said well, I can bring that Monday when I come to pick up the permit (R. 94).

Rev. Ray testified (R. 130-31):

I asked about the publicity that we were in the process of getting out to the people, that they were waiting for an answer, that they were demanding an answer. He [the Mayor] told us to go ahead with the publicity. Rev. Ely was there, Rev. Matthew was there, Rev. Davis was there. We asked if it was expedient to go ahead and announce this from our pulpits and he said yes, make contact with all the people. Put out your handbills, whatever you have, whatever you're in the process of doing, go ahead with it. Then they asked for a recess. They went out of the conference room

and stayed approximately five minutes and came back. Mr. Everette Turner said everything is all right, in order. What you all will do, Monday you will pick up your permit. Mr. Belt asked what do you want from us now? He said nothing. The Mayor spoke and said nothing but a copy of your grievances and I had prepared a copy of the grievances, duplicate form and presented it to the Mayor. . . . We assured them that it would be a peaceful march and they asked if we had our own marshals and we assured them that we did have our own marshals. . . . At that time we adjourned the meeting and we got up and the Mayor shook hands with all of us, the Councilmen exchanged handshakes with everybody. They said come in Monday and pick up your permit and give the Chief of Police a list in writing of the route that he had outlined here tonight and that's all.

Mr. Washington and Rev. Ely also testified that nothing had been said about a new or amended application (R. 119-21, 123).

The next day, Sunday, June 9th, the Negro ministers announced the march from their pulpits and thousands of handbills were distributed (R. 96-97, 105-06, 131).

On Monday, June 10th, Mr. Belt arrived at the Mayor's office about 9:00 a.m. to pick up the permit (R. 95, 104). The Mayor told Mr. Belt that the Council meeting was set for noon and that he should return later (R. 104). Nothing was said about a new or amended application.

The Council did meet around noon (R. 103-04). The City Clerk was not present (R. 48), but was later directed by the Mayor and Councilmen to send a letter from them

to Rev. Ray and Mr. Belt (R. 48).[2] The letter reaffirmed the Council's rejection of the Movement's application, citing the fifth reason stated in the letter of June 7th ("The disaster which occurred in California this week has created an emotional strain upon society which is not conducive to a parade of this type.") and concluding (R. 46, 107): "In our opinion, this situation continues to such an extent that it would jeopardize the public safety and welfare in Prichard were a march to be held at this time." The letter also noted (R. 46, 107):

> Although we have informally discussed this matter with you subsequent to our denial of your application, you have not filed a new or amended application, and our rejection of your application remains in effect.

Mr. Belt returned to City Hall after lunch but could find none of the city officials he had been dealing with (R. 95). He searched "desperately" (R. 97), until finally, at 3:40 p. m., a city detective gave him a copy of the letter (R. 97, 107).

The next day, Tuesday, June 11, Mr. Belt talked with the Mayor and told him that, because of the publicity distributed Sunday in reliance upon the Saturday night meeting, it was too late to call off the march (Mayor Capp's testimony (R. 105)). Wednesday, June 12, the day of the march, Mr. Belt telephoned each of the Councilmen trying to arrange for the Mayor to speak to the marchers wherever they were halted by the police, after which speech they would return to the church. Mr. Belt told each of the Councilmen: "I said please don't put us outside the law.

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[2] Their copies were introduced into evidence as Exhibits B and D (R. 45-46, 106-108).

We don't have no intention of being outside the law" (R. 100). Mr. Belt continued (R. 100-01):

> We was going to walk until we get to the barricade and the Mayor was going to talk to the people and we were going to turn the people around and bring them back to the church. This was our understanding. We was not supposed to be arrested.

It did not work out that way. About 1:15 p. m. Rev. Ray led his group of marchers from his church. The Chief of Police testified that the group numbered around 200 (R. 52). The only other police witness, Lt. Bryant, testified that the group numbered "in excess of 100" (R. 69). The group marched in the street (there are no sidewalks, R. 118) for about 2½ blocks until their path was blocked by a police line (R. 52-53). The chief informed the group, led by Rev. Ray and two flag bearers (R. 70)[3] that they were in violation of the parade ordinance and ordered them to disperse (R. 53). Chief Davis testified that about 100 persons left the line of march (R. 54); Lt. Bryant testified that only "a few" left the line of march (R. 70). The Mayor did not appear. Rev. Ray and 98 others stood their ground and were arrested.

Both Chief Davis and Lt. Bryant testified that the short-lived march was peaceful and orderly (R. 62, 74).

Rev. Ray and the others were charged with violating Ordinance No. 1135, set forth *supra,* pp. 3-10, in that they "did engage in, participate in, aid, form, or start a parade in the City of Prichard without securing a parade permit" (R. 1, 6). After trial and conviction in the Recorders' Court of Prichard, where he was sentenced to 60 days im-

[3] One was the American flag and the other a church flag (R. 118-19).

prisonment and fined $100.00 (R. 2), Rev. Ray was tried *de novo* in the Circuit Court of Mobile County.

Prior to trial petitioner filed demurrers challenging Ordinance No. 1135, both on its face and as applied in his case, as repugnant to the First and Fourteenth Amendments (R. 4-5, 7-9, 28). The demurrers were overruled (R. 6-7, 9). Petitioner was convicted and sentenced to 60 days imprisonment (suspended, on condition of one year's good behavior) and $100.00 fine (R. 9-11).

The other cases were stipulated to be governed by this case.

Petitioner unsuccessfully moved for a new trial, again challenging Ordinance No. 1135, on its face and as applied to convict him, as repugnant to the First and Fourteenth Amendments (R. 12-18). Petitioner renewed this challenge to Ordinance No. 1135 in his appeal to the Court of Appeals of Alabama. Petitioner's counsel set forth and briefed five assignments of error in her brief (Supplemental Record 22-31). The City's brief responded to these five assignments of error and prayed that petitioner's conviction be affirmed on the merits (S. R. 46-48).

On March 4, 1969, the Court of Appeals, First Division, *sua sponte* dismissed petitioner's appeal on the ground that petitioner's assignments of error had not been placed on the blank page reserved for that purpose in the record (R. 148-49; A. 1a-2a, *infra*). Petitioner's counsel attempted to cure this omission by petitioning for rehearing and supplying assignments of error collected on two sheets of transcript paper for insertion into the record (R. 150-52). Rehearing was denied without opinion (R. 153) and, on May 8, 1969, the Supreme Court of Alabama denied petitioner's timely petition for writ of certiorari (R. 158).

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted to Review and Reverse Petitioner's Conviction for Parading Without a Permit as Repugnant to the First and Fourteenth Amendments.

In a long line of decisions from *Lovell* v. *Griffin*, 303 U. S. 444 (1938), to *Shuttlesworth* v. *City of Birmingham*, 394 U. S. 147 (1969), this Court has acted to prevent state officials from breaching their public trust to keep open streets and parks "for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *C. I. O.*, 307 U. S. 496, 515-16 (1939).[4]

The guidelines for review are well settled. As this Court recently stated in *Shuttlesworth*, 394 U. S. at 155:

> The inquiry in every case must be that stated by Chief Justice Hughes in *Cox* v. *New Hampshire*, 312 U. S. 569: Whether control of the use of the streets for a parade or procession was, in fact, "exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." *Id.*, at 574.

The City Council's final denial of June 10th of the Movement's application for a parade permit abridged the right of assembly of petitioner and the other members of the Movement. Because of the absence of any Alabama procedures for expeditious judicial review of the Council's action, see Mr. Justice Harlan's concurring opinion in

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[4] See cases cited in *Shuttlesworth, supra*, 394 U. S. at 151, n. 2.

Shuttlesworth, supra, 394 U. S. at 161-64, the Council's denial "had the practical effect of the decision of a court of last resort" (*Id.* at 160). See also the concurring opinion of Mr. Justice Frankfurter in *Poulos* v. *New Hampshire,* 345 U. S. 395, 420 (1943), cited in *Shuttlesworth, supra,* 394 U. S. at 155, n. 4, in support of the requirement of "the availability of expeditious judicial review of the . . . refusal of a permit."[5]

The Council's letter of June 10th assigned two reasons for the denial:

> 1. "[T]hat it would jeopardize the public safety and welfare in Prichard were a march to be held at this time" (R. 46, 107);
>
> 2. That the Movement had not filed a new or amended application incorporating the changes in time and route agreed to at the "unofficial" Council meeting of June 8th (R. 46, 107).

The first reason was originally stated in the June 7th letter and amplified in the June 10th letter as grounded upon the Council's apprehension that "the public safety and welfare" might be jeopardized by the Movement's march:

> The disaster which occurred in California this week has created an emotional strain upon society which is

[5] In *Poulos,* this Court upheld New Hampshire's insistence that the issue of the unlawful denial of a parade permit be raised "through appropriate judicial procedure," 345 U. S. at 409, rather than by defense to a criminal prosecution; in *Poulos,* there was an "absence of any showing that Poulos did not have available a prompt judicial remedy" (345 U. S. at 420). Here, unlike *Poulos,* there is no apparent state bar to raising the issue defensively in a criminal prosecution and no prompt judicial remedy.

not conducive to a parade of this type (see p. 12, *supra*).

In our opinion, this situation continues to such an extent that it would jeopardize the public safety and welfare in Prichard were a march to be held at this time (R. 46, 107).

Thus, the denial reflected the intention of the Mayor and Councilmen to introduce a new standard based upon "the public safety and welfare" into Section 5 of the ordinance, see pp. 6-7, *supra*. This *de facto* expansion of Section 5 brought it squarely within the condemnation of *Shuttlesworth, supra,* 394 U. S. at 150-51:

> [I]n deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals, or convenience.' This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.

Moreover, the fear expressed by the Mayor and Councilmen of "an emotional strain upon society," finds no support in this record. "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker* v. *Des Moines Independent Community School District,* 393 U. S. 503, 508 (1969).

The Council's second ground for the denial was that the Movement had failed to file a new or amended application setting forth the changes in time and route agreed to by the parties to the June 8th "unofficial" Council meeting. This ground of denial fails, for three reasons. First, a new or amended application would have availed the Movement nothing, since such an application would have been unable to overcome the officials' "undifferentiated fear" that the march "would jeopardize the public safety and welfare in Prichard." Second, on this record, it is doubtful that the Council's demand for a new or amended application was ever communicated to the Movement representatives, see pp. 14-16, *supra*. Third, even assuming that this demand was communicated to the Movement's representatives, it was at most a technicality. The Council was fully empowered by Section 7 of the ordinance, set forth *supra*, pp. 7-8, "to authorize the conduct of the parade on a date, at a time, or over a route different from that named by the applicant" without the necessity of a new or amended application. The Movement's failure, if such it was, to file a new or amended application in no way resulted in the Councilmen being deprived of information necessary to responsibly issue the permit. The changes were primarily the product of the Chief of Police and were agreed to by the Movement representatives to satisfy the Council's earlier objections. It appears that these changes did satisfy the earlier objections (except, as it turned out, No. 5). For example, it must be presumed that, after the "unofficial" Council meeting of June 8th, the Councilmen no longer thought it possible that petitioner might wish to begin the parade at 3:30 a. m. (original reason No. 2). And presumably original reasons 3-4, 6-10, which were all based

upon objections to the original time and route, were dispelled by the new time and route.

That leaves only original reason No. 1, which rejected petitioner's application as "late" because it had not been filed at least 7 days before the proposed march. It is doubtful that this objection was reactivated by the letter of June 10th, for three reasons:

1. The application was actually filed on May 29, 1968 —14 days before the proposed march (although the fee of $5.00 was not paid until 6 days before the proposed march);

2. There is no indication that the Councilmen's deliberations were in any way hampered by the fact they were given only 6 days notice; between June 7th and June 10th they met three times and apparently deliberated fully on the application; and,

3. The Councilmen waived this objection at the June 8th "unofficial" meeting, as the circumstances of this case clearly indicated there was "good cause" to do so, Section 4(3), see p. 6, *supra*.[6]

---

[6] Under the view we take of this case, it is unnecessary for the Court to reach the issue of whether petitioner's application was "late" for purposes of the First and Fourteenth Amendments. Nevertheless, petitioner does not wish to be understood as waiving this issue. Petitioner's application was untimely only if the $5.00 fee for the permit can constitutionally be imposed. This is not free from doubt. Compare *Murdock* v. *Pennsylvania*, 319 U. S. 125 (1943) with *Cox* v. *New Hampshire*, 312 U. S. 569, 576-77 (1941). See also *Busey* v. *District of Columbia*, 138 F. 2d 592 (D. C. Cir. 1943). Nor is it free from doubt whether a filing period of more than 6 days can constitutionally be required. See *Freedman* v. *Maryland*, 380 U. S. 51, 58-61 (1965); *Teitel Film Corp.* v. *Cusack*, 390 U. S. 139 (1968); *York* v. *City of Danville*, 207 Va. 665, 152 S. E. 2d 259 (1967).

This case is important not only because Prichard officials exerted their licensing authority so as to offend principles established by decades of decisions of this Court but also because the convictions in this and companion cases threaten the very life of the Movement.[7] If Prichard is permitted to exact from the Movement a cumulative fine of between $5,000.00 and $10,000.00 and to hold suspended jail terms over the heads of its members, then the constructive, peaceful and nonviolent work of the Movement will be crippled. This result can and should be prevented by this Court.

II.

Petitioner's Procedural Default Is Too Insubstantial to Preclude This Court's Review of His Important Federal Claims.

"[T]he question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question . . . [A] litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest." *Henry* v. *Mississippi*, 379 U. S. 443, 447 (1965).

In this case the procedural default was petitioner's counsel's failure to collect her assignments of error in one place in the record instead of, or in addition to, placing

[7] Following Rev. Ray's trial in the Circuit Court, the other marchers pleaded guilty, with the understanding that they would not be sentenced until final disposition of this case by this Court, and that their convictions would be vacated if this Court reversed.

them in her brief together with supporting arguments. See p. 19, *supra*.

Under the circumstances of this case, this is hardly an omission sufficient to bar this Court's review of petitioner's substantial federal claims. Alabama Supreme Court Rule 1 requires assignments of error to be typed on transcript paper and bound in the record on appeals to the Court of Appeals or Supreme Court; however, Code of Ala., Tit. 15, §389 dispenses with assignments of error in criminal appeals to the Court of Appeals or Superior Court. Petitioner's counsel relied upon §389, unaware of its non-obvious construction that assignments of error were unnecessary in criminal appeals from convictions under state statutes but necessary in criminal appeals from convictions under municipal ordinances. See *Rosa Parks* v. *City of Montgomery*, 38 Ala. App. 681, 92 So. 2d 683 (1957).

Nonetheless, petitioner's counsel complied with the substance of Rule 1 by including the assignments of error in her brief, see Supplemental Record, pp. 22-31. No action on these assignments of error was required by the Circuit Court and their consideration by the Court of Appeals was in no way prejudiced by their omission from the blank page in the record. Here, as in *Wright* v. *Georgia*, 373 U. S. 284, 290-91 (1963), examination of petitioner's brief exposes the insubstantiality of the procedural default. To bar review in this case would be to resort to "an arid ritual of meaningless form." *Staub* v. *Baxley*, 355 U. S. 313, 320 (1958). See also, *NAACP* v. *Alabama*, 377 U. S. 288, 293-97 (1964); *Parrot* v. *Tallahassee*, 381 U. S. 129 (1965).

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

FRANKIE FIELDS
VERNON Z. CRAWFORD
1407 Davis Avenue
Mobile, Alabama 36603

JACK GREENBERG
JAMES M. NABRIT, III
MELVYN ZARR
10 Columbus Circle
New York, New York 10019

Attorneys for Petitioner

APPENDIX I

Opinion of the Court of Appeals of Alabama

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

OCTOBER TERM, 1968-69

1 Div. 383

A. ROBERT RAY

v.

CITY OF PRICHARD

APPEAL FROM MOBILE CIRCUIT COURT

CATES, *Judge*

This is a purported appeal from a judgment of conviction of a breach of a city ordinance requiring a permit to parade on city streets.

I.

Although the Clerk of the Circuit Court left a blank page therefor, this record comes here without any assignments of error. See Supreme Court Rule 1.

II.

A writ of error is a proceeding in an "appellate" or revisory higher court whereunder the judges are authorized to examine a record on which a judgment has been

given in a lower court of record. *Cohens* v. *Virginia,* 6 Wheat. 264, 409, 410.

This concept of essentially a new suit led to the pleading device of the allegation, e. g., "that manifest error to the hurt and prejudice of your appellant is made to appear in that * * * " Jones, *Alabama Practice and Forms,* §§ 35, 36 and 5571. This is the frame of the assignment of error. 5 Am. Jur. 2d, Appeal and Error, § 648.

Though the writ of error is no longer available in Alabama, except in criminal cases, assignments are still mandatory on submitting an appeal. Also, the assignments must be bound in the record. *Fuller* v. *Porter,* 274 Ala. 321, 148 So. 2d 648.

In criminal appeals, Code 1940, T. 15, § 389, expressly abolishes assignments of error. This expression of the one has been held to be exclusive as to other classes of appeal. The instant appeal is not criminal. *Casteel* v. *City of Decatur,* 215 Ala. 4, 109 So. 571 (3).

The dispensation of § 389, supra, does not compass appeals from convictions of violating municipal ordinances. See *Woods* v. *City of Tuscaloosa,* 43 Ala. App. 626, 198 So. 2d 306; 37 Am. Jur., Municipal Corporations, § 202.

Under the authority of *Parks* v. *City of Montgomery,* 38 Ala. App. 681, 92 So. 2d 683, wherein many cases are cited, the judgment below is due to be

AFFIRMED.

Judgment of the Court of Appeals of Alabama

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

OCTOBER TERM, 1968-69

1 Div. 383

A. ROBERT RAY

v.

CITY OF PRICHARD

APPEAL FROM MOBILE CIRCUIT COURT

October 24, 1968
CERTIFICATE FILED

December 26, 1968
TRANSCRIPT FILED

February 20, 1969

Come the parties by attorneys, and submit this cause on briefs for decision.

March 4, 1969

(JUDGMENT)

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the court, it is considered that in the record of the Circuit Court there is no error, no assignments of error having been entered in the transcript. It is also considered that the appellant pay the costs of appeal of this court and of the Circuit Court.

Order of the Supreme Court of Alabama Denying Certiorari

THE SUPREME COURT OF ALABAMA

THURSDAY, MAY 8, 1969

THE COURT MET PURSUANT TO ADJOURNMENT

PRESENT:

CHIEF JUSTICE LIVINGSTON AND ASSOCIATE JUSTICES
LAWSON, SIMPSON, MERRILL, COLEMAN,
HARWOOD AND BLOODWORTH.

1st Div. 583

Ex parte: A. Robert Ray, Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

(Re: A. Robert Ray v. City of Prichard)

Comes the petitioner, by his attorney, and the Petition for Writ of Certiorari to the Court of Appeals being submitted on [redacted]fs and duly examined and understood by the Court,

IT IS ORDERED that the Writ be and the same is hereby denied and that the Petition be and the same is hereby dismissed, at the costs of petitioner, for which costs let execution issue.

(Livingston, C. J., Lawson, Merrill
and Harwood, JJ., concur.)

(No Opinion written)

APPENDIX II

Certified Copy of Letter of June 7, 1968 From the Mayor and City Council of Prichard to the Mobile County Civil Rights Movement

(Letterhead of City of Prichard, Alabama)

October 11, 1968

I, Berniece H. Centanne, City Clerk of the City of Prichard, Alabama hereby certify that the attached record is a true and correct copy of a record on file in the City Clerk's Office in the City of Prichard, Alabama.

/s/ BERNIECE H. CENTANNE
Berniece H. Centanne, City Clerk

June 7, 1968

Mobile County Civil Rights Movement
Rev. A. Robert Ray
219 "D" St.

Prichard, Ala.
Mr. Herbert Belt
241 Chicago Ave.
Prichard, Ala.

Gentlemen:

You are hereby notified that the application for a parade permit filed with the City Clerk on June 6, 1968, in your

names, was considered by the Mayor and City Council on this date and rejected for the following reasons:

1. The application fails to comply with section 4, subsection (1) of Ordinance No. 1135, regulating the issuance of parade permits, since it was not filed seven days before the date on which the parade was proposed to be held.
2. The application failed to identify the time of day the parade was to commence and end, since it did not designate if the hours shown were A.M. or P.M.
3. The length of time requested for the parade was excessive in either case.
4. In the event it was the intent to have the parade in the afternoon, it would create a traffic hazard due to the congested traffic created by workers returning to their homes after work hours.
5. The disaster which occurred in California this week has created an emotional strain upon society which is not conducive to a parade of this type.

6. The application failed to define the route the parade was to follow from Prichard Park (Zoo) to its point of disbandment.

7. The application failed to clearly define the number of persons to participate in the parade.

8. The application failed to give a definite time that the participants would begin to assemble at the assembly area.

9. Highway 45 and Wilson Avenue are State and Federal Highways and to congest them would be hazardous to life and property.

10. The obstruction along the route designated could seriously hamper the answering of emergency calls including police, fire and ambulance calls.

The Mayor and City Council requests that I convey to you that they stand ready to meet with your grievance committee at any reasonable time.

Yours very truly,

/s/ BERNIECE H. CENTANNE
Berniece H. Centanne
City Clerk

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 17 1969
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1969

No. 432

A. ROBERT RAY,

Petitioner,

versus

CITY OF PRICHARD, ALABAMA,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAYER W. PERLOFF,
205 Van Antwerp Building,
Mobile, Alabama 36602,
Attorney for City of Prichard, Alabama.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No.

A. ROBERT RAY,
Petitioner,

versus

CITY OF PRICHARD, ALABAMA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Court of Appeals of Alabama, First Division, is reported at 222 So.2d 345, and the opinion and judgment of that Court as set forth in Appendix 1 of the petition. The order of the Supreme Court of Alabama denying certiorari is reported at 222 So.2d 346, and is also set forth in Appendix 1 of the petition.

JURISDICTION.

This Court should decline to exercise jurisdiction because the petitioner failed to observe reasonable State procedural requirements in seeking review of his conviction by the Court of Appeals of Alabama.

QUESTION PRESENTED.

Whether the petitioner is entitled to the issuance of a writ of certiorari to the Court of Appeals of Alabama when the petitioner, through his own neglect, fails to follow reasonable procedural requirements which result in the affirmance of the conviction in the court of first instance.

RULES AND STATUTES INVOLVED.

The rule or statute involved is Rule 23 (1) (f) Revised Rules of the Supreme Court of the United States, effective July 1, 1954. It is printed in the Appendix, *infra*, p. 9.

STATEMENT OF THE CASE.

The statement of the case of the petitioner as set out in its petition is substantially correct.

ARGUMENT.

The question presented in the case at bar is sufficiently narrow that no amount of strained semantics can convert it into one warranting review by this court on certiorari.

It has been the settled law of Alabama that "prosecutions for violations of municipal ordinances are statutory and quasi criminal in nature." The portion of the preceding statement enclosed in quotation marks is taken from *Parks v. City of Montgomery*, 38 Ala. App. 681, 92 So.2d 683, which was decided in 1957. There appears in the report of the case 15 cited cases in support of this proposition

of law, the earliest of which is *Perry v. State*, 1 Ala. App. 253, 55 So. 1035, which was decided in 1911.

The *Parks* case, *supra*, also contains the following:

> Such appeals are not governed by the statute regulating criminal appeals which dispenses of assignments of error, . . .

There is cited in support of this statement 14 cases, some of which are cited in support of the first proposition mentioned above, also commencing with *Perry v. State, supra.*

The *Parks* case, *supra*, continues with the following proposition:

> One of our fundamental rules relating to civil appeals is that there must be assignments of error, otherwise there is nothing before the court for review. Davis v. City of Guntersville, 27 Ala. App. 208, 169 So. 222; Wetzel v. Hobbs, 249 Ala. 434, 31 So.2d 639; Benich v. Stewart, 34 Ala. App. 61, 36 So.2d 599; Wrought Iron Range Co. v. Pollard, 37 Ala. App. 341; 67 So.2d 855; Tidwell v. Town of Town Creek, 264 Ala. 333, 87 So.2d 646.

The *Parks* case, *supra*, concludes with the following paragraph:

> Where no errors are assigned in appeals from convictions from violations of municipal ordinances, the judgment appealed from must be confirmed.

There is cited in support of this last paragraph 20 cases commencing again with *Perry v. State, supra.*

The proposition that appeals from a finding of guilt for the breach of a City ordinance is governed by the rules relating to civil appeals was reaffirmed in *Bokulich v. City of Demopolis*, 44 Ala. App. 543, 215 So.2d 608, decided in 1968.

It cannot be argued, by any stretch of the imagination, that these decisions have anything whatsoever to do with an attempt to circumvent violations of anyone's civil rights or constitutional guarantees. These are rules of law and of procedure which have been known, without questions, to be the Bench and Bar of the State of Alabama, since at least 1911 when the decision in the *Parks* case, *supra*, was first published.

It has long been the rule of this Court that if reasonable State procedural requirements are not observed, this court has declined to exercise jurisdiction both where the highest state court expressly refuses to decide the Federal question for this procedural reason, *Penn. R. Co. v. Ill. Brick Co.*, 297 U.S. 447, 462-3 (1935); *Erie R. Co. v. Purdy*, 185 U.S. 148 (1901); and where the highest state court is completely silent on the Federal question. *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 309 (1902). It should be noted that in failing to observe this reasonable State procedural requirement the rules of this court were violated in that the petition of the writ of certiorari does not comply with Rule 23(1) (f) which requires in part:

1. The petition for certiorari shall contain and the order here indicated—

. . . (f) if review of the judgment of the state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance *and in the appellate court*, at which, and the manner in which, the Federal questions sought to be reviewed were raised; *the method of raising them*.

(e.g., by pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; . . . as will show that the Federal question was timely and properly raised so as to give this court the jurisdiction to review the judgment on writ of certiorari. (Emphasis supplied.)

It thus appears that the rules of procedure of both this court and of the appellate court of the State of Alabama have been ignored.

In *Milk Wagon Driver's Union v. Meadowmoor Dairies*, 312 U.S. 287 (1940) which was a case involving the issuance of an injunction by the State of Illinois in a labor dispute this court held:

. . . B. But we do not have revisory power over state practice provided such practice is not used to evade constitutional guarantees.

It cannot with any degree of logic be contended that the state practice in the instant case was used to evade constitutional guarantees.

Perhaps the case which comes closest to declaring the reason that the petition for writ of certiorari should not be granted in the case at bar is *Parker v. Illinois*, 333 U.S. 571 (1948) where Mr. Justice Douglas speaking for the Court said:

> When Federal rights are involved, it is, of course, for this court finally to determine whether the failure to follow the procedure designed by a State for their protection constitutes a waiver of them. Davis v. O'Hara, 266 U.S. 314, 69 L.ed. 303, 45 S.Ct. 204; Central U. Teleph. Co. v. Edwardsville (U.S.), supra. The court said in the Edwardsville case that when the waiver is founded on a failure to comply with the appellate practice of a state, the question turns on whether that practice gives litigants "a reasonable opportunity to have the issue as to the claimed right heard and determined" by the State court. 269 U.S. pp. 194, 195, 70 L.ed. 231, 46 S.Ct. 90. It was there held that the Illinois practice of requiring constitutional questions to be taken directly to the Illinois Supreme Court and of refusing to review them if review was first sought in the appellate court satisfies the requirement. We adhere to that decision. The channel through which the constitutional questions raised by the petitioner in his attack on the amended order, could have been taken all of the way to this court was not only clearly marked, it was also opened and unobstructed.
>
> Petitioner appears here *pro se* but *at the critical stages of this litigation he was represented by counsel of record*. For the lawyer the choice was plain. Under these circumstances petitioner plainly had a reasonable opportunity to have his Federal questions passed upon by the State court. When petitioner acting through counsel decided to seek review in the appellate court he

made a choice which involves abandonment of the constitutional issues which he had raised in the proceedings. . . . (Emphasis supplied.)

The petitioner in the case at bar was represented at all "critical stages" of this litigation by counsel of his own choice who were members of the Bar of the State of Alabama, and knew or were presumed to know the rules of appellate procedure of the State of Alabama.

The case of *NAACP v. Alabama*, 357 U.S. 449 (June 30, 1958) is easily distinguishable from the case at bar. There is a rule of state pleading or procedure had been used unreasonably to avoid a decision relative to federal rights. In addition the ruling was inconsistent with earlier state court rulings. This situation does not exist in the case at bar. The rulings of the appellate courts of the State of Alabama in the case at bar are consistent with all of the rulings made on the point in issue since first brought to the Appellate Court's attention in 1911.

The petitioner through his own neglect failed to avail himself of the remedy supplied him by the State of Alabama to attack the judgment against him and it thus follows that if a remedy is available but the petitioner through his own negligence fails to avail himself of it he cannot complain that such failure denies him due process of law guaranteed by the Fourteenth Amendment. *Paterno v. Lyons*, 334 U.S. 314 (1948).

CONCLUSION.

It is evident that the State of Alabama provided a reasonable method for the petitioner to raise those constitutional questions which concerned the judgment rendered against him in the court of the first instance; that his failure to do so was a result of his own neglect and as a consequence of this the writ of certiorari should be denied and the judgment below affirmed.

Respectfully submitted,

MAYER W. PERLOFF,
205 Van Antwerp Building,
Mobile, Alabama 36602,
Attorney for City of Prichard, Alabama.

APPENDIX.

(From Supreme Court Practice—Rules and Statutes—23 (1) (f) pp. 548)

(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and in the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

Where the portions of the record relied upon under this subparagraph are voluminous, and the petitioner has not filed with his petition nine copies of the record as printed for the use of the court below, under the provisions of paragraph 4 of Rule 21, then those portions of the record shall be included in an appendix to the petition, which may, if more convenient, be separately presented.